JEAN BODIN ON SOVEREIGNTY.

WITH SOME REFERENCE TO THE DOCTRINE OF THOMAS HOBBES.

THE political and legal philosophy of England since Bentham has done much for the fame of Thomas Hobbes. Reverential hands have placed the sage of Malmesbury on a pinnacle where his peculiar genius may receive its due honor. It was a characteristic freak of fate that committed to Austin and Molesworth and Grote, chiefs of modern radicalism, the task of securing proper recognition for the most resolute defender of absolute monarchy. The work, however, was well done, and to-day English politics and jurisprudence alike look to Hobbes as their philosophical progenitor. His devotion to the cause of monarchy is justly regarded as accidental rather than essential in his general theory. Quite apart from this incidental feature, the solid and enduring substance of his system is his doctrine of sovereignty — of the ultimate nature of political and legal authority. The mathematical precision of his analysis in this field forms a most striking contrast to the confused thinking of most of his contemporaries, and the English school of positive law has done little more than develop the conceptions which he clearly defined.

The veneration of Hobbes by his countrymen is thus justifiable. But though his work in the development of political science was great and significant, it is quite wrong to suppose that the history of the theory with which his name is associated begins with him. Thoughtful Englishmen nowadays sometimes concede the insularity of their national character. It is this quality, probably, that accounts for the common neglect of Hobbes's continental forerunner. The same tendency is at work in the common ascription of the theories of the social contract and of popular sovereignty to the writers of the Puri-

tan revolution in England. As a matter of fact, these ideas played a great rôle on the Continent seventy-five years before they assumed prominence in Great Britain.[1] The Anglo-Saxon spirit, however, is not historical. The applicability, not the origin, of political ideas, has for it the greatest interest. It would not be rash to assert that a majority of intelligent and ordinarily cultivated Americans believe that Thomas Jefferson invented the theory of natural liberty and equality which is expressed in the preamble to the Declaration of Independence; and probably George III would get an easy recognition as the leading exponent of the theory of absolute monarchy. The history of political theories, as a fruitful branch of philosophical general history, has not yet received much attention from English-speaking peoples. Professor Pollock's excellent but inadequate *History of the Science of Politics*,[2] is the only systematic work in the language that I know of. Sketchy as it is, however, it opens up in every direction vistas that lead the reader far beyond the history and the literature of England. Not the least important of its suggestions is this: that in the religious and political chaos of the Continent, and especially of France, during the sixteenth century, were moulded into form both the theory of absolute monarchy and that of popular sovereignty. England under the Tudors had the practice, but not the theory,

[1] *Cf.* Professor H. L. Osgood, "The Political Ideas of the Puritans," in the POLITICAL SCIENCE QUARTERLY, VI, 1 (March, 1891). It is by no means intended to intimate that these ideas cannot be traced farther back than the sixteenth century. Sir Robert Filmer, whose Patriarcha Locke and the modern *Zeitgeist* have combined to render rather ridiculous, was yet on solid historical ground when, speaking of the theory of popular sovereignty, he attributed its development to the schoolmen, "who, to be sure to thrust down the king below the pope, thought it the safest course to advance the people above the king" (Patriarcha, I, 1, end). And the influence of the classical writers in moulding the theories of the schoolmen is well known. For the early history of the social-contract idea, *cf.* Mr. D. G. Ritchie, in this QUARTERLY, VI, 656 (December, 1891); also in his collected essays entitled Darwin and Hegel (Sonnenschein and Macmillan, 1893).

[2] Macmillan, 1890. This little sketch of 126 small pages, covering the whole field down to modern times, presents a significant contrast to Janet's two-volume Histoire de la Science Politique, which ends with the eighteenth century, to Bluntschli's excellent Geschichte der Neueren Staatswissenschaften, and to the encyclopædic work of von Mohl.

of absolute monarchy. Hobbes completed a rational theory just as the practice finally ended. In France the Huguenot writers developed the theory of popular sovereignty which triumphed in England; but when order came in their own land the political question was settled on the lines of absolute monarchy. And the writer who formulated the theory which thus gained practical ascendency bore the name of Jean Bodin.

In this article I propose to examine some of the more prominent features of Bodin's political thought, and particularly his theory of sovereignty. In comparing his views with those of Hobbes a sufficient resemblance may appear to attract attention. But it is not at all necessary to conclude that the Englishman slavishly followed the earlier writer. A very superficial knowledge of Hobbes's intellectual equipment will suffice to absolve him from the suspicion of subserviency to the thought of another; and the differences between the two men in method and in general philosophic feeling are as marked as the similarity in some of their conclusions. The objective political conditions amid which they lived, however, were in many repects similar, and conspired to lead them to the same solution for their respective problems. Hence, from different starting-points and by different routes, the two reached the same goal. But Bodin preceded Hobbes in time; and it is no discredit to the latter to conjecture that the work of the former played some part in determining the type of his philosophy.

I.

The dates which mark the limits of Bodin's life, 1530 and 1596, suggest at once the turmoil of his political environment. It was the period that witnessed the extinction amid imbecility and crime of the house of Valois. The forces of feudalism; revived under declining royal authority, and those of religious animosity, stimulated by the Reformation, reduced France to anarchy. Imminent or actual civil war was for four decades the prevailing condition. It was the time of the Guises, of Catherine de

Medici, of St. Bartholomew's, and of the League. French history at this period presents the Gallic version of the Wars of the Roses and the Puritan revolution. France combined the outbursts which England separated by nearly two centuries.

In the civil and religious strife of the times, Bodin was fitted neither by character nor by training to be a violent partisan.[1] His temperament was altogether scholarly and philosophical. So far was he from sharing in any of the religious prejudices which played so large a part in the prevailing troubles, that it is not known to this day precisely what his creed was.[2] He was educated as a lawyer, but lacked the spirit of the practitioner. Seeking his fortune at Paris (he was born at Angers), he seems to have had no success at the bar; but his first published work[3] brought down upon him promptly the wrath of no less a personage than Cujas, the acknowledged leader of French jurists at that time. For Bodin, regarding law from the standpoint of universal history, was outspoken in criticising the exclusive study of the Roman law which was characteristic of his day; and Cujas was scandalized at his heresy. Bodin's ability soon brought him into connection with the court, and most of his life was spent in the public service. Fully informed as to the forces at work in the political conflicts of the time, he set himself resolutely against all disintegrating tendencies. With the Chancellor L'Hôpital, and the other distinguished thinkers who came to bear the party name of *Les Politiques*, Bodin sought to restrain every faction, whether Catholic or Huguenot, whether Guise or Bourbon, and to

[1] All desirable information as to the personality of Bodin, as well as an admirable analysis of his works and of the political theories of his contemporaries, may be found in the exhaustive work of Henri Baudrillart, J. Bodin et son Temps (Paris, 1853).

[2] The inconveniences of the philosophical attitude in his day are illustrated by the fact that Bodin was assailed at different times as a Catholic, a Calvinist, a Jew, a Mohammedan and an atheist. His Heptaplomeres is a remarkable work, in the form of a dialogue between representatives of seven religious and philosophical creeds, with a strongly theistic tendency. *Cf.* Baudrillart, p. 190.

[3] Methodus ad facilem Historiarum Cognitionem (1566). The work embodies in outline a philosophy of law and a philosophy of history. Its general lines are those of Montesquieu's Esprit des Lois.

center authority in the monarch. The Machiavellian methods of Catherine de Medici and her infamous offspring long rendered impracticable the policy of the moderates; but it was to the latter that was due ultimately the accession of Henry IV.

In the great mass of literature which the civil wars called forth there was rarely to be found any defense of absolute royal power. Huguenots and Catholics alike proclaimed in vehement terms the dogmas of popular sovereignty and tyrannicide. The criteria of tyranny were, of course, contradictory. To the Calvinist the plotting of St. Bartholomew's was a most conclusive test; to the Papist, the desertion of the League. Equally diverse and confusing were the theories as to the authority which should act in decreeing the deposition of the tyrant. Was this power in the general body of his subjects, in the privileged classes, in the estates, in the parliaments, in foreign rulers, or in the pope? Each of these solutions had its advocates, but none of them carried conviction beyond a relatively small circle of supporters. The times were not suited to close logic and exact thinking. Controversy, not philosophy, was uppermost in men's minds; passion, not reason, was the animating force. It was amid the chaos of thought and feeling which this literature reveals that Bodin's *Republic* appeared, clearly distinguished from its contemporaries by the philosophic serenity of its spirit, the scope of its learning, the precision of its analysis and the exactness of its logic. The book is characteristic of its author. Bodin, like Hobbes sixty years later, could find no firm footing in the theories of the factions. He felt the need of a system that should embody somewhere a clear and unquestionable source of authority. His historical and philosophical training furnished him with a method; his study of Aristotle suggested the outline of his work; his juristic training and experience guided him in the detection and elaboration of refined legal distinctions; and the necessity of the times dictated his triumphant presentation of an exact theory of sovereignty.[1]

[1] The practical ends that Bodin had in view are very clearly stated in the dedicatory preface of his Republic.

One need only recall that Hobbes's *De Cive* appeared in 1647 and his *Leviathan* in 1651, to realize how closely the general conditions amid which he wrote paralleled those that surrounded Bodin.[1] English and Scotch Puritans were declaiming as vigorously against tyranny as had the Huguenots before them, and were even more vigorously resisting the tyrant; the Parliament at London was imposing practical restrictions upon the monarch more effectively than had been done by the French Estates-General; and in the literature of the time there was no less of passion and no more of clear-cut and generally accepted doctrine than there had been at the time of St. Bartholomew's. Hobbes published his political treatises while in exile. The meeting of the Long Parliament had been too much for his none too steady nerves, and he had gone immediately to France, "the first of all that fled," as he himself candidly confesses.[2] In Paris he lived in close relations with the royalist colony, and for a time acted as instructor to the future king, Charles II. Like Bodin, thus, he was identified with the royalist party in a time of civil dissension. Like Bodin, he wrote his philosophy of politics for the explicit purpose of attaining exactness in the conceptions of state and sovereignty.[3]

But when we consider the philosophical methods of the two writers, we are confronted with the widest possible divergence. In Bodin appears the lineal successor of Aristotle and Machiavelli and the forerunner of Montesquieu, — the thinker who seeks from the results of man's experience in social and political life to generalize the principles upon which that life depends. The pages of the *Republic* are crammed with historical lore from every age and clime, and the science of the state appears in the fullest sense as an inductive science. Hobbes, on the other hand, is thoroughly imbued with the spirit that brought

[1] Though Hobbes seems to have thought out the general principles of his political philosophy before the civil war in England, the precise formulation of his theory was undoubtedly influenced by the events of that war. *Cf.* article "Hobbes," by Prof. Croom Robertson, in Encyc. Brit., 9th ed.

[2] Works, Molesworth's edition, 1840, IV, 414.

[3] *Cf.* introductory letter to the Earl of Newcastle, Works, vol. iv.

forth in his day such astonishing results in physics and mathematics. To him geometry was the only true science ;[1] and the exactness of its method and conclusions could alone satisfy his mind. Accordingly the *Leviathan* reveals no such array of erudition as swells the volume of the *Republic*. There appear instead a series of definitions in which the fundamental concepts of science are formulated and distinguished with astonishing acuteness ; and from these depends a chain of deduction so close and cogent as to bear the reader helplessly to the philosopher's conclusions. The critic who seeks to assail the system of Hobbes at any point in its development must be bold indeed. Like Euclid, he can be attacked only in his premises. His political writings are quite bare of historical references. He rests the success of his theories wholly on the intellectual conviction that his abstract reasoning about human nature must effect ; while Bodin depends upon the interpretation of the concrete facts of man's experience.

At one point the two philosophers come on common ground, and that is, in their position with reference to the use of authority. Both are true representatives of the *Renaissance*, and so have great contempt for the methods of the schoolmen. Bodin complains of the hopeless diversity of views among those who have written on politics, and concludes that it is not worth while to waste time in weighing authorities.[2] Hobbes never loses an opportunity to express his disdain for the schoolmen, and indeed for any one "who takes up conclusions on the trust of authors, and doth not fetch them from the first items in every reckoning, which are the significations of names settled by definitions."[3] Those who depend on authority may *believe*, but they cannot *know*.

[1] "Geometry, which is the only science that it hath hitherto pleased God to bestow on mankind." — Leviathan, ch. iv.

[2] "Quaerendum putavimus, non quid quisque dixerit aut senserit, quantaeque auctoritatis fuerit, sed quid rationi convenienter posset et sententiae suae dicere." De Republica Libri Sex, Præfatio (Francofurti, 1641).

[3] Leviathan, ch. v, *et passim*. Hobbes had great confidence in reflection as contrasted with reading. He said that if he spent as much time as others did in reading, he would be as ignorant as they.

II.

In laying the foundations for his discussion of sovereignty, Bodin follows pretty closely the lines of Aristotle's *Politics*. The social basis and philosophical end of the state; the analysis of the family and the distinction between family and state; the characteristics of paternal authority and the institution of slavery, — are all treated in a manner that strongly suggests the Greek precursor. But it cannot be said that Bodin is subservient to the Stagirite in his conclusions. He is too true to the Aristotelian method to attain Aristotelian results. In philosophy based on history, the accident of chronology must profoundly affect different systems. The later writer has necessarily more history from which to generalize. Nineteen centuries separated Bodin from Aristotle — centuries replete with striking social and political phenomena. That any of the Greek's principles could be approved by the Frenchman, is a great tribute to the former's genius; that so many were modified or rejected, is the surest basis for the renown of the latter. The influences which are most apparent where Bodin diverges from Aristotle are those of Roman history and law, Jewish tradition and recent European history.

It is not my purpose to dwell on all the interesting features of the *Republic* outside of the doctrine of sovereignty. Some of the more striking may be mentioned in passing. The author formulates at the outset a definition of the state (*respublica*) which suggests the most conspicuous characteristics of his philosophy. "The state is an aggregation of families and their common possessions, ruled by a sovereign power and by reason."[1] In this is implied, what the later chapters elaborate, that the basis of the state, both in historical and in logical development, is the family; that a distinction must be drawn between interests that are common and those that are not; that a supreme power is essential to the idea of the state; and that government is conditioned by a moral end. By rational

[1] "Respublica est familiarum rerumque inter ipsas communium, summa potestate ac ratione moderata multitudo." Lib. i, cap. i.

rule he means rule in accordance with that natural law which embodies the dictates of justice. The sway of reason, rather than appetite, he regards as indispensable to distinguish between a state and a pirate band. In treating in detail of social relations, he brings to bear against the theories of communism not only the Aristotelian arguments, but also the recent practical results of Anabaptist extravagances in Germany. Family relationships are closely analyzed, with a leaning towards a conception of marital authority that has more kinship with the rights of the *pater familias* in Roman law than with the "constitutional government" of the Aristotelian husband. Finally, Bodin creates a distinct place for himself in the history of social evolution by an elaborate assault on the moral and philosophical foundations of the institution of slavery.[1]

As between Hobbes and Bodin, it would not have been strange if the latter, rather than the former, had conceived of the state as having its origin in a deliberate act of volition on the part of a number of individuals. The contract theory of the state was so direct an outgrowth of the revival of Roman law in Europe that a jurist of the sixteenth century might very naturally have adopted it. But in Bodin's day the contract idea was the weapon almost exclusively of the factions whom he was opposing; and this fact, combined with the historical bent of his temperament, turned him to the Aristotelian conception of the state as a phenomenon developing more or less unconsciously out of the inherent qualities of man and his environment.[2] By the time Hobbes wrote, the contract theory had become so ingrained in all political philosophy that to avoid it was as impossible as it is to-day to avoid the influence of the theory of evolution. The Englishman, therefore, took it up, but so modified it as to render it serviceable to absolutism as well as to what he considered anarchy.

It is in the sixth chapter of the first book of the *Republic*,

[1] Lib. i, cap. v.

[2] Strictly speaking, it is society, rather than the state, that Bodin conceives as thus originating. The distinction between the two is vaguely present in his mind. The objective fact in the formation of historical governments he holds to be *vis major*. *Op. cit.*, I, vi.

where Bodin takes up the consideration of citizenship, that the character and importance of his theory of sovereignty begin to appear. The confused and contradictory criteria of citizenship in Aristotle's *Politics* are rejected, especially the assertion that participation in political rights (ἐκκλησιάστης καὶ δικάστης) is a prime characteristic of the citizen. A citizen, says Bodin, is "a free man who is subject to the sovereign power of another."[1] "Free" excludes slaves, but not women or those under paternal authority. Excepting the servile class, then, the population of a state falls into two primary divisions, sovereign and citizens. In the latter class there may be, with respect to one another, an infinite variety of rights, privileges and immunities of individuals; but with respect to the sovereign, all stand in precisely the same relation, namely, subjection. It is not necessary to follow Bodin's exhaustive examination of the law of antiquity and of later centuries to catch the drift of his purpose. He is very ready to concede that the peer may have different rights and privileges from the townsman (*bourgeois*), the townsman from the rustic and from other townsmen; but he feels that the aggregation of social classes which feudalism has developed can only attain the unity and order of the true state life through a power dominating and regulating all alike. Subjection to such a sovereign power is the sole test of citizenship, and the recognition of a common sovereign is the sole criterion of a state (*respublica*).

Like many of his predecessors in political philosophy since Aristotle became the chief authority in Europe, Bodin is troubled to adapt to the great feudal monarchies of the sixteenth century the principles which the Greek derived from the homogeneous city-state. He is writing in the time of transition from the feudal to the national state. He is conscious of the importance of common customs and laws in determining political relations, but as a loyal subject of the French monarch, he cannot at all concede that such community is a basis for political independence. He distinguishes, there-

[1] Liber homo qui summae alterius potestatis obligatur. I, vi.

fore, between the state (*civitas*) and the commonwealth (*respublica*) much as it is customary at the present day to distinguish nation from empire. The *respublica* consists of citizens subject to the same sovereign power,

> tametsi moribus, legibus, institutis ac infinita gentium varietate inter se differant. Si vero cives omnes iisdem legibus utantur, non solum eadem respublica, sed etiam civitas eadem est; tametsi cives huc illuc per vicos, urbes et municipia dispersi a se ipsis sedibus sejungantur. . . . Civitas plurium vicorum ac urbium cives iisdem legibus ac moribus complexa moderatur.[1]

Throughout the chapter it is possible to discern in Bodin's thought the influence of Greek, Roman and mediæval conceptions. The Hellenic πόλις and the Roman *urbs* and *municipium* included villages (*vici*); the feudal state, after the rise of the towns, included many *urbes;* and Bodin's *respublica* includes all these earlier forms.

III.

In the eighth chapter of Book I, Bodin takes up the formal discussion of sovereignty.[2] The idea is embodied, as we have already seen, in his definition of state. He defines the conception thus: "Sovereignty is supreme power over citizens and subjects, unrestrained by the laws."[3] Considering that such a definition is absolutely essential to the idea of the state, Bodin assumes an air of pardonable pride in declaring that neither philosopher nor jurist has ever before propounded one.

In the development of his definition, it is laid down that authority which is truly sovereign must be not only supreme, but perpetual — that is, without limit of time. Thus the Roman dictator, with all his power, fell short of sovereignty through the limitation of his term. Similarly any official entrusted with supreme authority for the accomplishment of some specific purpose is less than sovereign. The *Decemviri*

[1] De Republica, I, vi.

[2] For a good account of the earlier history of this conception, see Gierke, Johannes Althusius, pp. 123 *et seq.*

[3] Majestas est summa in cives ac subditos legibusque soluta potestas.

legum ferendarum were but the commissioners of the sovereign *populus Romanus*. Regents, viceroys and such dignitaries fall into a like category. Yet Bodin takes care not to carry the idea of "perpetual" too far. He is not ready to exclude the conception of monarch from the scientific treatment of politics. "But if," he says, "we construe perpetual power as that which will never have an end, sovereignty will have no existence save in the popular and the aristocratic state; since the people [only] is immortal, unless, indeed, it be utterly exterminated." The life tenure of supreme power, therefore, constitutes sovereignty in an individual. Sovereignty in this sense may be bestowed by a people on an individual, or be transferred from one individual to another, and in either case it is equally valid, so long as it is free from condition.

Just at this point there is obvious one of the gaps in Bodin's theory. He is at some pains to establish the alienability of sovereignty — that long and hotly contested point; but he omits to account philosophically for the possession of that which he holds may be transferred. He is very near to a realization and a solution of the problem when he reflects on the immortality of "the people," as compared with any individual. He might have distinguished between the eternal principle of order and authority which is implied in the very conception of an immortal people, and the power to issue and enforce specific commands which is but an outcome of that principle. But here, as in so many other parts of his work, Bodin is preoccupied with his purpose of justifying absolute monarchy; and he misses the chance to pass from legal to the broader grounds of political sovereignty.

The supremacy implied in *majestas* is set forth by Bodin with an abundance of analysis and illustration. The essence of the idea is embodied in the words "*legibus soluta*." Sovereignty has its chief and characteristic function in the making of laws.[1] From the binding force of these laws, the sovereign is by the nature of the case free. But not from all laws. "If

[1] Summum jus majestatis in eo potissimum versari, cum non modo singulis sed etiam universis leges dantur iisque imperatur.

we should define sovereignty as a power *legibus omnibus solutam*, no prince could be found to have sovereign rights; for all are bound by divine law, by the law of nature and by that common law of nations which has its source in these." This distinction is consistently observed by Bodin. His legislator is the legislator of the jurist, not of the theologian or of the moral philosopher. He assumes, but nowhere closely defines, the *leges divinae, naturae et gentium*. Those are conceptions beyond his precise sphere, always controlling, indeed, but from a higher plane, the phenomena with which he wishes specifically to deal. The sovereign, like the subject, is bound by the law of God and of nature, but his obligation in this respect is to God, by whom it will be enforced.

As to the civil law — the law of the land — the sovereign's[1] will is the ultimate source of its every precept, and the will is free. No statute, whether enacted by himself or by his predecessor, survives a duly signified change of will on the part of the holder of sovereign power. Bodin is quite explicit in laying down this fundamental principle, but his subsequent discussion introduces some important modifications. The law of God and of nature comes in to determine the answer to several questions. If a prince (sovereign) has sworn to observe the laws of his fathers, is he bound thereto? Not, says Bodin, if he has sworn merely with himself; but the obligation is good if another prince (sovereign) has a recognized interest in it, or if it is undertaken toward the subjects as a condition of reigning. Here, however, the force of the obligation arises not from the oath but from the *bona fide* contract, which, in the case of a sovereign, must be sharply distinguished from a law. The prince, like the private citizen, is subject to the principles of natural law, among which the keeping of contracts occupies a high place. Yet when the reason for a pledge has ceased, the obligation on the part of the prince *ipso facto* ceases. Though Bodin does not point it out, the sovereign,

[1] Bodin employs the word *princeps* for "sovereign"; and this usage contributes greatly to aggravate the confusion between sovereign and monarch which has its primary source in the writer's preference for monarchy.

under this theory, has a most important advantage over the subjects in the fact that his decision as to when the reason for a given pledge has ceased is very likely to be final. That the author is in some way conscious of difficulty in the practical working of his principle appears, however, in his declaration that "well-informed princes do not allow themselves to come under the obligation of an oath where matters of legislation are concerned, lest they should not enjoy the supreme power in the state."

In addition to the keeping of promises, the other principles of the law of nature operate to hedge about the sovereign. Especially earnest and explicit is Bodin in the matter of private property. The omnipotence of a prince is only *imperium*, not *dominatus*. The author cites approvingly the maxim of Seneca: *Ad reges potestas omnium pertinet, ad singulos proprietas.* "Without just cause the sovereign cannot seize or grant away the property of another." And he cites with a true lawyer's delight instances in which the French kings have submitted to the judgments of their own courts in questions touching private property.

It is obviously with a view to guarding against any possibility of warping his theory to the support of oppressive government that Bodin dwells with such iteration on the restraints that the sovereign must find in the divine and natural law. An elaborate distinction between the king and the tyrant is worked out on this basis.[1] The king is he who renders to the laws of God and of nature the same obedience which his subjects render to him. The tyrant spurns these laws and abuses at his caprice the liberties and property of his subjects. But the tyrant is no less a sovereign than the king. Sovereignty is a political fact, consisting only in the possession and exercise of supreme power; the distinction between true royalty and tyranny rests

[1] Lib. ii, cap. i–iv, passim. Bodin actually makes a threefold classification of monarchies, the characteristic of one class, the *Dominatus*, being the enjoyment of property rights (*dominium*) by the sovereign over the persons and possessions of his subjects. The same principle of classification is applied rigorously to aristocracy and democracy also.

on a moral principle, and is determined by the mode of exercising this power.

In addition, however, to the restraints of divine and natural law, there are evidences in Bodin's thought of other limitations upon the sovereign which cannot so easily be put in the category of moral as distinct from legal limitations. There are *laws* in the state which the sovereign cannot touch. His allusions to these superior rules are far from clear, but they seem to indicate a somewhat vague notion in the writer's mind of what we call a constitution. Thus, in discussing the extent of the sovereign prince's authority in respect to the laws, he says :

> But so far as concerns the laws of empire (*leges imperii*), since they are connected with sovereignty itself, princes can neither abrogate nor derogate them. Of this class is the Salic Law, the firmest foundation of this kingdom.

In not explaining fully the conception involved in the term *leges imperii*, Bodin is again guilty of a serious lapse. His anxiety to have something in a state more fixed and permanent than the human will leads him to limit the power *legibus soluta*, by *leges* as well as by *jus*. But who is the law-maker in the case of these *leges imperii?* Bodin might have answered, consistently with his general theory of the historical origin of the state : Nature. But this conception of nature would have been quite distinct from that which lay at the bottom of his *leges naturae*, and would have led to multiplied confusion. Or he might have found the source of these laws in that people, in whose collective life he sees the only possibility of a perpetual sovereignty.[1] But from lines of reasoning that lead in the direction of popular authority, Bodin's aversion is very pronounced ; a *populus* in his view is too nearly identical with a disorderly mob. So his opportunity to elaborate the great distinction between the constitution-making sovereign and the ordinary law-making superior was lost. With his exact definition of the latter, however, he advanced the theory of sover-

[1] *Supra*, p 93.

eignty to a point beyond which a great many writers have not passed even at the present day.

The failure of Bodin to dilate upon the distinction just noticed is the more surprising in view of the very elaborate discussion of the meaning of *lex* in his treatment of the characteristic rights (*jura*) of sovereignty.[1] The first of these rights is *legem universis ac singulis civibus dare. Lex* is sharply distinguished from *edictum* or *decretum.* The sovereign makes law ; the magistrates issue decrees. So the relation of custom (*consuctudo*) to law is effectively set forth. It is not true, he holds, that custom and law are of like character and force, and that the people, as the source of the one, is on a level with the prince, the source of the other. Law can abolish custom ; not so the converse :[2] custom has no sanction, while sanction is characteristic of law ; the force of custom is precarious till the sovereign establishes a sanction, whereupon the custom at once becomes law. Hence, he concludes, both law and custom depend on the will of those who hold the sovereign power in the state. Again, the distinction between *lex* and *jus* is noted. *Jus* relates to what is just and good, without regard to any command ; *lex* relates to the sovereignty of one issuing a command.[3] In short, law, he says, is nothing else than a command of the sovereign. After this, the conception of *leges imperii,* above the sovereign will, seems very much out of place in Bodin's system.

More in keeping with his usually vigorous logic is his analysis of the forms of state.[4] Here his keen analysis leads him to the presentation of a distinction of the utmost importance to scientific politics. Adopting, with characteristic criticism and amendment, the old Aristotelian classification of monarchy, aristocracy and democracy, he points out that the

[1] Lib. i, cap. x.

[2] This apparently doubtful proposition he fortifies by declaring it the duty of the magistrates to recall into operation laws whose force has been weakened by custom.

[3] Plurimum distat lex a jure : jus enim sine jussu, ad id quod aequum bonum est ; lex autem ad imperantis majestatem pertinet. Lib. i, cap. viii.

[4] Lib. ii, cap. i.

essential character of the state is quite different from the principle of government.[1] The state may be monarchic and the government aristocratic or democratic; or an aristocratic state may be popular in government. Whatever may be the minor defects in Bodin's conception of sovereignty, it is clear enough to lead him to this capital distinction between state and government. The form of the state is determined solely by the number of those in whom the sovereignty is vested; the form of government is determined by the manner in which the administration of the sovereign's will is distributed among the subjects. There are but three possible forms of state, according as the sovereignty is in one, in more than one but less than all, or in all. Writers who have talked of mixed forms of state have been led astray by their failure to distinguish state from government. Not in sovereign power, but in administration can there be such a joint participation of different elements as to justify the designation "mixed." A monarchic state has an aristocratic government when the sovereign monarch confers honors and offices upon certain classes only; it has a democratic government when honor and office are bestowed on all classes alike. The early Roman republic was a democratic state with an aristocratic government. The Athens of Pericles was democratic in both state and government.

In applying his doctrine to the facts of contemporary state systems, Bodin strikes a vicious blow at that venerable sham, the Holy Roman Empire. Tested by his conception of sovereignty, this august body politic is found to be, not the most exalted of monarchies — indeed, not a monarchy at all, but so far as it is a simple state, a mere aristocracy.[2] Sovereignty is in the diet, not in the emperor. In respect to the complete sovereignty of each of the members of the empire, however, Bodin thinks that it is really more like a confederacy than a simple state. So far as I am aware, this is the earliest literary

[1] Illud admonendi sumus, reipublicae statum ab imperandi ratione distare plurimum, quod ante nemo quantum intelligere potuimus animadvertit. — Lib. ii, cap. ii, *ad init.*, *et passim.*

[2] Lib. ii, cap. vi.

exposition of the transformation of the empire, which became very clear to everybody after the Thirty Years' War.[1] England gives Bodin some trouble in classification. If Parliament really possesses all the importance that is claimed for it by the historians, he recognizes the impossibility of describing England as a true monarchy. But his investigation of incidents in the Tudor reigns convinces him that ultimate authority is really in the king, and that accordingly the state is monarchic. A similar conclusion is reached as to Spain; and France he treats throughout as a model monarchy of the royal type.

IV.

When we turn from Bodin to Hobbes, we find that the latter, unlike the former,[2] leaves no uncertainty in respect to the origin of sovereignty. A deliberate act of volition by each member of a community transfers all his rights and powers to some person or assembly of persons. In this transfer is to be found the origin of the body politic, as distinct from a mere inorganic mass of individuals. In the aggregate of rights and powers transferred is the essence of sovereignty. Right and might are in Hobbes fundamentally identical; therefore, supremacy of the sovereign over the individual springs immediately from superiority of power. But Hobbes is not content to start from the mere fact of individual consent as the condition of political organization. The cause for this consent is sought, and is found in the instinct of self-preservation. Without following the philosopher into his ingenious theory of the "state of nature" and the "war of all against all," his conclusion is that for self-preservation men's reason teaches the necessity of certain rules, conformity to which is indispensable to social existence. These rules require, among other things, the abandonment by the individual of his natural rights, which

[1] From as far back as the time of Philip the Fair the lawyers of the rising French monarchy had scoffed at the pretensions of the emperors; and legal tradition probably aided Bodin in his criticism. *Cf.* Poole, Illustrations of Mediæval Thought.

[2] *Ante*, p. 93.

are identical with his natural powers, the keeping of covenants (in which alone, according to Hobbes, consists justice), the exercise of gratitude, forgiveness, equity, *etc.*[1] But having deduced these laws of nature, and formulated them so as to make them the logical basis of the state, Hobbes takes precautions at once to avoid the ambiguities and confusions found in Bodin at this point.

The greatest improvement made by Hobbes upon his predecessor is undoubtedly to be found in the Englishman's analysis of the term law. The so-called laws of nature which he has worked out, are not, he says, really laws, but merely "conclusions or theorems concerning what conduceth to the conservation and defense" of men. "Law, properly, is the word of him that by right hath command over others."[2] The ultimate human right to command is vested in the sovereign by the contract through which the state is instituted. Civil laws, then, consist in expressions or other manifestations of the will of the sovereign, who himself is not bound thereby.[3] Divine law is that which emanates from the will of God. Ultimately the law of nature may be regarded as divine law, though it is present to men not directly as a command, but as a body of principles found out by the reason. A directly revealed command of God addressed to a particular person or people is law proper, and is designated as "divine positive law."

Discriminating thus between the different kinds of law, Hobbes understands and boldly grapples with the difficulties bound up in the question of interpretation. He will not leave open here a refuge for the enemies of order. All laws, he says, need interpretation, particularly the unwritten law of nature.[4] But this latter becomes law proper only when it is embodied in commands of the sovereign; and for the citizen the binding interpretation in this case, as in case of civil laws pure and simple, is that of the sovereign, through his duly constituted judges. Hobbes has no patience with those who

[1] Leviathan, chapters xiii–xv.
[2] *Ibid.*, (Morley's edition), pp. 78, 79.
[3] *Ibid.*, p. 123 *et seq.*
[4] *Ibid.*, p. 128.

look to the moral philosophers for authority as to the law of nature, or to the commentators as to the civil laws.

> The interpretation of the laws of nature in a commonwealth dependeth not on the books of moral philosophy. The authority of writers without the authority of the commonwealth maketh not their opinions law, be they never so true. That which I have written in this treatise concerning the moral virtues, . . . though it be evident truth, is not, therefore, presently law. . . . For though it be naturally reasonable, yet it is by the sovereign power that it is law.[1]

And again:

> When question is of the meaning of written laws, he is not the interpreter of them that writeth a commentary upon them. For commentaries are commonly more subject to cavil than the text, and therefore need other commentaries; and so there will be no end of such interpretations.[2]

Thus the footing which the factions have found in various interpretations of the moral and the civil law is swept away, and the sovereign stands triumphant. But there remains one other hope for the adversaries of absolutism. What if they could oppose to the sovereign a directly revealed command of God? Such a command, Hobbes readily admits, must supersede all human authority. But could the knowledge of such a command be independent of human judgment? If all men, in the presence of one another, received an identical manifestation of God's will, that would be conclusive. But when some one man or body of men comes forward claiming to have received privately a revelation from God, how shall other men be satisfied of its authenticity? Hobbes can find no adequate answer to this question, and his solution of the whole problem is reached on the same lines that have been followed in connection with the law of nature and the civil law.

> In all things not contrary to the moral law, that is to say, to the law of nature, all subjects are bound to obey that for divine law which is declared to be so by the laws of the commonwealth.

And the reason of this is simple.

[1] Leviathan, p. 128. [2] *Ibid.*, p. 129.

If men were at liberty to take for God's commandments their own dreams and fancies, or the dreams and fancies of private men, scarce two men would agree upon what is God's commandment; and yet in respect of them, every man would despise the commandments of the commonwealth.[1]

With logic like this there is no possibility of such confusion as we have seen in Bodin over the relation of the sovereign to the *leges divinae, naturae et gentium.*[2] Hobbes does indeed declare in various passages that the sovereign is bound by the law of nature; but his precise analysis of the source and character of this law leaves no room for the delusion that the sovereign's obligation is at all of the same type as that of the subject. The latter is bound under the terms of the original contract; but this contract is most carefully framed by Hobbes so as to exclude the sovereign from any share in it.[3] Thus, while the keeping of contracts is a precept of the law of nature that affects the subjects, it has no application, so far as they are concerned, to the sovereign. Again, Hobbes scoffs at the classification of forms of state according to the relation of the sovereign to the laws of nature.[4] Three forms, and three only, are logical. The others are merely the expressions of individual feeling.

They that are discontented under monarchy call it tyranny; and they that are displeased with aristocracy call it oligarchy; so also they which find themselves grieved under a democracy call it anarchy, which signifies want of government. And yet I think no man believes that want of government is any new kind of government; nor by the same reason ought they to believe that the government is of one kind when they like it, and another when they dislike it, or are oppressed by the governers.[5]

There is obviously no room in Hobbes's thought for any conception like Bodin's *leges imperii.*[6] Nor has the Englishman any such respect for private property as is displayed by

[1] Leviathan, p. 133.

[2] "The law of nations and the law of nature is the same thing." Leviathan, p. 161.

[3] Leviathan, p. 85.

[4] *Ante*, p. 95.

[5] Leviathan, p. 90.

[6] *Ante*, p. 96.

the French writer. To sovereignty pertains "the whole power of prescribing the rules whereby every man may know what goods he may enjoy . . . without being molested by any of his fellow subjects; and this is it men call 'propriety.'"[1] It is a doctrine that tends to the dissolution of a commonwealth, "that every private man has an absolute propriety in his goods, such as excludeth the sovereign." What property a man holds, he has only from the sovereign.[2] On the other hand Hobbes agrees substantially with Bodin in respect to the relation of custom to law,[3] and in the distinction between the sovereign and the administrative system, or government.

V.

From the standpoint of pure speculation, it is impossible to deny that Hobbes's doctrine is more complete and perfect than that of Bodin. Where the latter, with the caution of the philosophic statesman, hesitated, the former, with the indifference of the exact mathematician, followed the path of his reasoning to the end. The student of history and law is not apt to be as confident as the devotee of the physical sciences, in regard to the availability of abstract formulas for solving political problems. The hostility aroused by the ethical[4] and

[1] Leviathan, p. 87.

[2] "Where there is no commonwealth there is . . . a perpetual war of every man against his neighbor; and therefore everything is his that getteth it and keepeth it by force; which is neither propriety nor community, but uncertainty." Leviathan, p. 116.

[3] While Bodin, as stated above, looks upon custom as lacking the character of law until the sovereign signifies positively his will in respect to it, Hobbes regards the silence of the sovereign as expressing his will. "When long use obtaineth the authority of a law, it is not the length of time that maketh the authority, but the will of the sovereign signified by his silence." Leviathan, p. 124.

[4] It must be pointed out, however, that in one important instance criticism of Hobbes is generally unfair. He is censured greatly for holding that no law, *i.e.*, expression of the will of the sovereign, can be unjust. He does, no doubt, say precisely that. But he has so defined justice as to include under the term only part of the idea usually connoted thereby. Justice, he says, is only the keeping of promises; and the original contract involved a promise of submission to the sovereign. Disobedience, therefore, is unjust. But this sense of justice involves only what is

religious doctrines of Hobbes obscured for a century the value of much that he wrote. Bodin, on the other hand, had great vogue for a time, though his rational and juristic absolutism was ill adapted to the appetite of the age which feasted on the emotional and divine-right doctrine of Bossuet. It was Montesquieu's great work that brought French thought back into the methods of Bodin, while Rousseau introduced the method of Hobbes. But the divergence of the later pair of writers was much greater than that of the earlier. The whole effect of Montesquieu's work was to emphasize those elements in social and political life which are most independent of human volition, and hence to minimize the significance, if not to exclude the conception, of absolute sovereignty. Rousseau, on the contrary, intensified, if possible, the absoluteness of the sovereign human will as conceived by Hobbes, and made it the sole basis of his democracy.

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known as commutative justice. Distributive justice is defined by Hobbes under another name, equity. And the whole criticism falls when Hobbes admits that the sovereign, while he cannot commit injustice, can commit iniquity. Leviathan, p. 86.